

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayner
Marshall Johnson
Thomas Pugh
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner

In the Matter of a Commission Investigation
into Possible Modification of its Procedure
for Reviewing Non-Dominant Carrier
Acquisitions and Transfer of Control
Transactions

ISSUE DATE: May 22, 2007

DOCKET NO. P-999/CI-07-192

ORDER DECLINING TO ADOPT
PROPOSED REVIEW MODIFICATIONS
AND APPROVING APPLICATION
CONTENT CHECKLIST

PROCEDURAL HISTORY

On September 13, 2006, Level 3 Communications, LLC (Level 3) filed a petition requesting that the Commission authorize a streamlined process for a nondominant carrier to obtain administrative approval of transfer and financing transactions. The matter was assigned to Docket No. P-5733/PA-06-1310.

On October 13, 2006, the Minnesota Department of Commerce (the Department) filed comments recommending that the Commission open a generic proceeding to consider Level 3's proposed streamlined procedures for transfers of control and the Department's recommended modifications of those procedures.

On December 8, 2006, Level 3 filed additional information regarding its proposed streamlined approval process for transfer transactions. The additional information was an Order from the North Carolina Utilities Commission and the final Staff recommendation of the Louisiana Public Service Commission. This information shows that at least two other states are considering or have approved a streamlined approval process for transfers of control.

On February 15, 2007, the Commission issued its ORDER CLOSING DOCKET AND OPENING GENERIC PROCEEDING. The Commission determined that a generic proceeding (Docket No. P-999/CI-07-192) should be opened to consider whether the current procedures for reviewing non-dominant carrier acquisitions and transfers of control should be modified, and if so what those procedures should be. The Commission also issued a Notice of Comment Period to solicit comments in its generic proceeding.

On March 16, 2007, the Minnesota Independent Coalition (MIC), Midcontinent Communications (Midcon), Verizon/MCI (Verizon), Level 3, Qwest, and the Department filed comments.

On March 30, 2007, the Department, Verizon, Midcon, and Level 3 filed reply comments.

The Commission met on May 3, 2007 to consider this matter.

FINDINGS AND CONCLUSIONS

I. The Current Process for Reviewing Non-Dominant Carrier Acquisitions and Transfer of Control Transactions

The framework for the Commission's responsibility to review and approve acquisitions and transfer of control of telecommunications service providers is established in Minn. Stat. §§ 237.16, subd. 1(b), 237.16, subd. 4, 237.23 and 237.74, subd. 12 and Minn. Rules, Part 7812.2210, subp. 16.

The following is a brief description of Minnesota's current process for reviewing and approving transfers of control.¹ Parties seeking Commission approval prepare and file an application describing the transaction, including detailed financial information and a description of new management and owners in the case of a transfer. In their applications, they provide information to demonstrate why the public interest will be served by granting the application. Since they bear the burden of showing that the proposed change in ownership or control is consistent with the public interest (based on such factors as the potential impact of the transaction on consumers, competition, rates and service quality), they need to provide information demonstrating that the purchasing corporation has the technical, managerial and financial qualifications to acquire control of the purchased company and that the transaction is in the public interest.

The Department then reviews the filing for completeness and may seek further data from the parties regarding, for example, the extent of in-state operations, the new owner's financial and technical capacity, etc. Once the Department deems the filing complete and files a recommendation with the Commission to approve or modify², the matter is reviewed by Commission staff and brought to the Commission's Consent Committee for an expedited Order or, if significant issues are identified, with proposed modification to the full Commission.

When, as is usually the case, Commission staff does not object to the Department's recommendation, the matter is placed on the Commission's Consent Calendar for issuance of an expedited Order pursuant to Minn. Stat. § 216A.03, subd. 8 (a). Unless a party, a participant, or a Commissioner files an objection to this decision within ten days of receiving it, it becomes the Order of the full Commission under Minn. Stat. § 216A.03, subd. 8 (b).

¹ Transfers of control include sales of majority stock interests or other cognizable controlling interests, mergers, and sales of substantially all assets.

² The Department simultaneously serves a copy of its comments and recommendation on all parties, including the petitioners.

II. Level 3's Proposal to Create an Exception to the Current Review Process for Non-Dominant Carriers

A. September 12, 2006 Petition — Implied Conditional Approval

In its September 12, 2006 petition, Level 3 proposed that the Commission adopt an optional procedure allowing non-dominant carriers to obtain expedited Commission review and approval of their acquisitions and transfers of control. Under the optional expedited procedure, non-dominant carriers would 1) file a Notice to the Commission the same day it filed a request (petition) with the Federal Communications Commission (FCC) and/or the Department of Justice (DOJ) for approval to transfer a domestic license to a new owner and 2) include with the Notice certain specific information. Unless the Department filed an objection prior to the 20th day after such a Notice was filed with the Commission, the Notice would be deemed conditionally approved by the Commission. Later, upon receipt of FCC and, if necessary, DOJ approval, the parties, once they have filed the Notice with the Commission, would be free to close their transfer transaction unless the Department or another party objected and the Department stated that further review was warranted.

Level 3 acknowledged that it is important to preserve the Commission's ability to regulate carriers certified to provide intrastate services including monitoring transfer of control transactions but stated that it proposed its optional review process to expedite the approval process and gain greater predictability regarding the timing of such approval.

Level 3's September 13, 2006 proposed process was supported by Verizon/MCI, Midcon, and MIC if it also applied to small Minnesota ILECs. No party proposed an alternative process.

B. Hearing Modification — Indicator of Conditional Approval

At the hearing on this matter, Level 3 modified its proposal with respect to conditional approval. The Company proposed that within 20 days of filing the Notice the Department provide applicants with a tangible indicator (a Department-generated document) that the transaction had conditional approval. The Company argued that it was important to be able to show prospective creditors that the transaction was on track for final approval by the Commission.

III. Commission Analysis and Action

The Commission has reviewed the historical data provided by the Department documenting the number of days from filing to Order for all requests for approval of transfers of control received by the Commission between January 1, 2006 and February 8, 2007. The average processing time for these requests is 45.6 days, with 15 requests (34%) exceeding that average and 29 requests (66%) processed in fewer days than the average. In addition, the data shows that eleven of the applications (25%) were processed to Order in 30 or fewer days.

Moreover, there is no suggestion in the record that either the Commission or the Department have at any point not moved forward on the requests with due speed and diligence, consistent with the public interest review required by Minnesota statutes. Indeed, Level 3 stated at the hearing that Department works industriously and efficiently with the requesting companies to review their requests and formulate its recommendation for the Commission regarding these requests.

In explaining the variability in the processing time for these requests (between 16 and 106 days³), the Department noted that requests for transfers of control vary in complexity and require individual analysis. Moreover, the Department stated, many requesting companies do not provide all the necessary documentation in their initial filing and also vary considerably in the timeliness of their response to the Department's request for additional data needed to complete the Department's review. The Department stated that it works with the requesting companies to obtain all necessary information and makes its recommendation to the Commission once that the information is provided.

Based on the historical record, it appears that companies filing complete applications and promptly responding to Department requests do not need across-the-board processing deadlines to secure expeditious and predictable processing of their applications. For these companies, their complete filings and prompt responses are their most efficient means to expedite the Department's review and recommendation.

For incomplete-filers and slower-to-respond companies or those with more complex transactions, it appears that imposing an across-the-board deadlines for Commission approval or rejection of requests to approve transfers of control would simply result in the Department filing recommendations to deny company requests that failed to provide adequate information within the designated timeframe. A Department recommendation to deny based on inadequate development of the record would likely prompt the requesting company to file comments objecting to that recommendation, thereby further extending the approval process.

While the Department's recommendation to deny might also result in the company filing the necessary information, such a forced filing might still be incomplete or otherwise inadequate. In any event, forcing the Department to file a recommendation on a company's incomplete filing to meet a 30-day deadline would result in an inefficient and unproductive expenditure of resources on the part of the Commission, the Department, and the requesting company.

In short, therefore, establishing across-the-board deadlines for processing these requests seems undesirable as a practical matter. A more straightforward way to facilitate expeditious review appears to be to encourage companies to provide the most complete initial filing possible and thereafter to work with the Department, as it directs, to facilitate its review and recommendation.

As a reasonable step in that direction, the Department has developed a checklist of items it would like requesting companies to provide as part of their initial filing. The Commission has reviewed that list and concurs that up-front provision of the identified information would be a significant practical aid to the Department in its review. Receiving that information as part of the company's initial filing would eliminate the time lost while the Department reviews the filing to determine what information is missing, requests the missing information, and waits for it to be supplied. A copy of the Department's list is attached, marked Exhibit A.

³ One aberrant docket (06-971) closed 186 days after the initial filing. This docket is not useful in gaining a realistic picture of pre-closing processing time because requesting company had completed its transfer of control without Commission approval and its subsequent belated request for approval came before the Commission in conjunction with an agreement with the Department for a "payment in lieu of penalties" for failure to file a timely (pre-merger) request for approval.

The Commission approves and endorses this checklist as representing best practices and will request the Department to post it on its website as a resource for companies filing petitions for transfers of control.

At the hearing, Level 3 proposed that the Department provide a “conditional approval” document within 20 days of the filing. The Department did not support this proposal and the Commission will not approve it. Such a document would have no legal standing and would be more likely to confuse or mislead lenders than to reassure them.

Having declined to adopt Level 3's proposals for the practical reasons discussed above, the Commission need not address 1) the Department's contention that the current statutes prohibit the Commission from adopting the modified process proposed by Level 3 and 2) MIC and Qwest's position that Minnesota statutes do not allow the Commission to differentiate between dominant, non-dominant, and other types of carriers regarding Commission review of transfers of control.

ORDER

1. Level 3's recommended modifications of the Commission's review process for acquisitions and transfers of control are not approved.
2. The Commission approves and endorses the checklist attached hereto as representing best practices and asks the Department to post it on its website as a resource for companies filing petitions for transfers of control.
3. The Department's recommended review criteria are approved. Copy attached.
4. The docket is hereby closed.
5. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling 651-201-2202 (voice) or 1-800-627-3529 (MN relay service)

Exhibit A

Criteria for Transfer of Control Applications

1. Information identifying the parties;
2. A summary description of the transaction;
3. An affidavit signed by an officer of each of the requesting parties:
 - a. stating that the current transaction will not be completed prior to the Commission's approval;
 - b. attesting to the fact that the acquiring party has the financial capabilities to continue to provide service to customers, and including a copy of the parties' most recent financial statements;
 - c. including a statement that no new 911 approvals are needed, or a statement that parties will obtain such approvals prior to offering local voice services;
 - d. addressing the intent of the parties with respect to assumption or transfer of the parties' interconnection agreements;
 - e. setting forth the intent of the parties with respect to the release or return of NXX codes to NANPA;
 - f. setting forth the anticipated status of the acquired company following close of the transaction (i.e. will the entity continue to offer services in Minnesota or will the entity be extinguished);
 - g. describing who shall be responsible for filing annual reports or making other regulatory filings following the close of the transaction. The statement should include contact information for such person or internal department;
 - h. describing the parties' customer notification plans;
 - i. describing anticipated tariff changes or a statement that no tariff changes are necessary;
 - j. stating that parties agree to file with the Commission a notice of closing within 20 days of completion of the transaction;
 - k. stating that the parties agree to pay any outstanding regulatory fees of either or both parties.
 - l. accompanied by a copy of the parties' transfer of control agreement.
4. At any time following filing, the Commission or Department may make inquiries of the parties, and if necessary, take action to protect consumer interests, initiate proceedings and/or impose conditions on the carrier's certificate(s) including reporting requirements that address consumer interests. The parties shall not close a transaction to sell, lease, encumber or transfer a certificate of public convenience and necessity without authorization by the Commission.
5. Existing Commission customer notification requirements shall remain in effect.

Pro Forma Transfers of Control

In the event of a *pro forma* change, including but not limited to a corporate restructuring, internal transfer, or other change in form which does not result in a change of the ultimate ownership or control of the carrier or its assets, and there is no impact on Minnesota authorized operating companies, only a pre-transaction notice is required by the Commission.